UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 2, 2007

CBCA 415, 448

GREENLEE CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Gary Greenlee, President of Greenlee Construction, Inc., Alpharetta, GA, appearing for Appellant.

David A. Leib, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **PARKER**, and **GOODMAN**.

**DANIELS**, Board Judge.

The General Services Administration (GSA) moves for summary relief in two appeals filed by Greenlee Construction, Inc. (Greenlee) regarding a contract which an agency contracting officer terminated for the convenience of the Government. We grant the motion and deny the appeals.

## Background

1. On November 30, 2004, GSA awarded to Greenlee a contract for construction work described as "partitioning and miscellaneous repairs" in Atlanta, Georgia. The work

was to be performed at buildings under the jurisdiction of GSA's Atlanta Property Management Center (PMC) South and Atlanta PMC Central offices. Respondent's Statement of Uncontested Facts (RSUF) ¶ 1.[1] The contract was for a one-year period and could be extended, at GSA's option, for either or both of the next two years. Appeal File, Exhibits 1 at 5, 30 at 3, 189, 211.[2] The agency's cover letter regarding this award includes the statement, "This constitutes your notice to proceed with the work." Appeal File, Exhibit 5 at 1; *see also* Appellant's Statement of Uncontested Facts (ASUF) ¶ 8.[3]

2. The contract included Federal Acquisition Regulation (FAR) clause 52.216-22, "Indefinite Quantity (Oct 1995)." As printed in the contract, the clause stated:

> (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
>
> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum." The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum."

Appeal File, Exhibit 30 at 210.

3. The contract as awarded stated, "The guaranteed minimum total dollar amount of this contract is set at $25,000 for each award." Appeal File, Exhibit 30 at 188; *see also* RSUF ¶ 18 and appellant's response thereto. The contract also stated on its cover page, "Government Cost Range: $50,000 to $1,000,000." Appeal File, Exhibit 30 at 3.

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[1] Citations to Statements of Uncontested Facts are, unless noted, to asserted facts to which objection has not been raised by the opposing party.

[2] The appeal file contains three different versions of the contract. Appeal File, Exhibits 1, 30, 31. For the purpose of resolving GSA's motion for summary relief, we accept Greenlee's contention that where the versions conflict, the one contained at Exhibit 30 is correct.

[3] Although only GSA filed a motion for summary relief in these cases, Greenlee as well as GSA submitted a Statement of Uncontested Facts.

4. The contract included 1757 separate line items. A description, unit, and unit price was shown for each of the line items. For example, line item 0001 was described as "remove and discard - partition - gyp bd [gypsum board, or drywall] demountable"; the unit was one linear foot; and the unit price was $8.68. The contract contained, in a document entitled "Building Repairs and Alterations, GSA Job Order Contracting, Indefinite Quantity Contract," details as to the meaning of each line item description. Appeal File, Exhibits 1, 30.

5. Bids were to be "'net,' or a percentage decrease from or increase to the unit prices listed." Appeal File, Exhibit 30 at 185. "The percentage listed on the bid form must contain bidder's overhead, profit and all other contingencies therewith, as no allowance will be made later for such items." *Id.* at 186. Only four entries could be made for each contract year -- one each for partitioning work performed during regular working hours, partitioning work performed outside regular working hours, asbestos abatement performed during regular working hours, and asbestos abatement performed during regular working hours. If GSA chose to order any particular line item of work under the contract, a bidder's price for that line item would be the unit price for the item multiplied by the "net" or percentage decrease from or increase to that unit price. For example, if a bidder were to bid +10% for partitioning work performed during regular working hours, and line item 0001 was partitioning work, because the unit price for that item was $8.68, the bidder's price would be $8.68 plus 10% of $8.68, or $9.548. *Id.*, Exhibits 1 at 5, 30 at 185-86.

6. Greenlee bid "net" for partitioning work both during and outside regular working hours, -45% for asbestos abatement during regular working hours, and -30% for asbestos abatement outside regular working hours. These prices were valid during the base contract year and each of the option years. When GSA awarded the contract to Greenlee, these became the contract prices. Appeal File, Exhibit 1 at 5.

7. The contract contained provisions regarding bonds. It stated, "If the contract price is more than $25,000, the Contractor shall furnish a performance bond . . . and [a] payment bond." Appeal File, Exhibit 30 at 184. The FAR clause entitled "Performance and Payment Bonds -- Construction (July 2000)," 48 CFR 52.228-15, was incorporated into the contract by reference. *Id.* at 155. It defines "original contract price," for indefinite quantity contracts, as "the price payable for the specified minimum quantity."

8. The contract also referred to $25,000 as being "the minimum order limitation" and "the minimum order." Appeal File, Exhibit 30 at 184, 209.

9. Additionally with regard to bonds, the contract said, "[T]he cost of bonds shall not be paid as a lump sum upon submission of the first invoice for GSA ordered service.

Offeror should include the cost of bonds in the percentage factor bid." Appeal File, Exhibit 30 at 3; *see also id.* at amdt. 0002.

10. The contract incorporated by reference standard FAR clauses for changes ("Changes (Aug 1987)," 48 CFR 52.243-4) and termination for the convenience of the Government ("Termination for Convenience of the Government (Fixed-Price) (Sep 1996) -- Alternate I (Sep 1996)," 48 CFR 52.249-2). Appeal File, Exhibit 30 at 201, 202.

11. Relations between Greenlee and GSA were strained even before the contract was awarded to Greenlee. Award of an apparently identical contract for partitioning work in the Atlanta South and Central areas was made to a company other than Greenlee in July 2004. Greenlee filed a protest with the General Accounting Office (GAO), however, and that Office granted the protest. GSA terminated that contract, and in November 2004, the agency followed GAO's recommendation that it make the award to Greenlee. Appeal File, Exhibit 44; Background ¶ 1.

12. Three days after the Greenlee contract was awarded, Greenlee wrote to GSA counsel:

> [W]e want to be assured that we are not going to receive a substantial amount of carpeting and painting in place of complete remodeling jobs. Since painting and carpeting have historically been the lowest or no profit jobs on the partition list, we are not interested in doing excessive amounts of either that are unassociated with the total remodel of a tenant space.
>
> . . . .
>
> If the GSA determines to only give Greenlee the $50,000.00 minimum instead of the full value of the contract, then we will have more problems.

Appeal File, Exhibit 46.

13. At about the time that the protested contract award was made to another company, GSA decided to change the unit prices for some of the line items which were included in partitioning contracts in the Atlanta area. RSUF ¶ 15. According to e-mail messages from a GSA cost estimator, unit prices for 163 (or 9.27%) of the line items were changed to make them more appropriate -- and to keep the Government from paying what on some line items were prices significantly above market. Appeal File, Exhibit 10 at 1, 7.

14. GSA had in place at that time a contract with Gem Technologies, Inc. (Gem) for partitioning and asbestos abatement work in the Atlanta North area. During the contract year which ran from October 29, 2004, to October 28, 2005, Gem's percentage modification to the line item prices for partitioning work during regular working hours was "net" and for partitioning work outside those hours was +.05%. Appellant's Exhibit C. On July 9, 2004, Gem's contract was amended to substitute for the original line items new line items with GSA's revised unit prices. The contract was further amended to make the percentage factor to be applied to the unit prices, for the year in question, +13% for partitioning work during regular working hours and +18% for partitioning work outside those hours. Appellant's Exhibit D.

15. On December 8, 2004 -- just nine days after Greenlee's contract was awarded -- GSA asked Greenlee to propose percentage increases or decreases from the unit prices on the agency's revised list of line items. Greenlee responded on December 13, proposing percentage increases of 85% on all partitioning and asbestos abatement line items, whether performed during or outside regular working hours. RSUF ¶ 17; Appeal File, Exhibit 2 at 2-3 (unnumbered). The agency's cost estimator advised the contracting officer, with particular reference to the prices for partitioning work, "I am of the firm belief that an 85% modifier is very extreme. I would expect something from -10% to maybe +20% in the worst case." Appeal File, Exhibit 10 at 8; *see also id.* at 9. GSA rejected Greenlee's proposal. *Id.*, Exhibit 2 at 6-7 (unnumbered).

16. On January 19, 2005, the GSA contracting officer unilaterally issued modification PC03 to Greenlee's contract. This modification stated, "Subject modification is to add $5000.00 to base year contract for partition." It also stated, "This purchase request is to cover the minimum guarantee of $5,000 under base year of partition contract." Appeal File, Exhibit 2 at 4-5 (unnumbered); *see also* RSUF ¶ 20 and appellant's response thereto.

17. On February 15, Greenlee and GSA agreed to modification PA04 to their contract. This modification included the following language:

> The purpose of this modification is to make the following clarifications to the contract:
>
> . . . .
>
> 6. Modification PC03 obligated the Minimum Guarantee in the amount of $5,000 for the base year of the partition contract. This requirement is in accordance with PBS PIB OGMIDIQC 072004-1 letter, the guaranteed

> minimum of $5,000 is hereby obligated, and will be de-obligated at the end of the option period if minimum has been met.
>
> . . . .
>
> 8. . . . FAR 52.216-19 [*see* Background ¶ 8] is replaced with . . .
>
> > (a) Minimum Order. When the Government requires supplies or services covered by this contract in an amount of less than **$2,000**, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

Appeal File, Exhibit 2 at 6-7 (unnumbered); *see* RSUF ¶ 22 and appellant's response thereto.

18. On February 17, Greenlee wrote to the contracting officer regarding a meeting which had been held on the previous day. According to Greenlee, during that meeting the contracting officer had "stated that we would need to pay bonds on all jobs regardless of size. We believe that the rule is any job under $100,000.00 does not require bonds. . . . We do not care to pay bonds on anything under $100,000.00." RSUF ¶ 23; Appeal File, Exhibit 13. Greenlee addressed the bonding issue in a letter dated February 18 as well: "According to FAR 28.102-1, (b)(1),[4] only jobs between $25,000 and $100,000.00 can be required to provide payment protection. Under $25,000.00 can not be required to provide payment protection. . . . Because you have insisted, we can provide Tripartite payment protection on jobs over $25,000. RSUF ¶ 24 and appellant's response thereto; Appeal File, Exhibit 14.

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[4] The cited FAR provision, 48 CFR 28.102-1(b)(1) (2003), reads as follows:

> Pursuant to Section 4104(b)(2) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), for construction contracts greater than $25,000, but not greater than $100,000, the contracting officer shall select two or more of the following payment protections, giving particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives: (i) A payment bond. (ii) An irrevocable letter of credit (ILC). (iii) *A tripartite escrow agreement*. . . . (iv) *Certificates of deposit*. . . . (v) A deposit of the types of security listed in 28.204-1 [United States bonds or notes] and 28.204-2 [certified or cashiers checks, bank drafts, money orders, or currency].

19. On February 25, 2005, Greenlee wrote to the contracting officer:

> We recently learned on a website that Gem Technologies Inc. (Gem) had been doing many jobs under the term partition contract. We also learned that the GSA was using the line items that were in our original contract . . . and that the GSA gave Gem an +18% premium on the contract.
>
> . . . .
>
> We believe that the GSA needs to adjust the term partition contract of Greenlee Construction, Inc. to +18% just as the GSA did for Gem. Whatever the GSA does for one company, the GSA can do for another company. To do anything else is substantially unfair.
>
> Please do not assign Greenlee Construction, Inc. any orders under this contract until our contract is amended to +18%.

RSUF ¶ 25; Appeal File, Exhibit 15.

20. The contracting officer responded by observing that Gem's contract covered a different geographic area from Greenlee's contract and acknowledging that while Greenlee's protest was pending, GSA had placed orders against Gem's contract for work in the areas covered by Greenlee's contract. The contracting officer concluded, "GEM Technologies' terms and conditions are totally separate from your terms and conditions. Therefore, there is no relationship between the two contracts. Thus, your contract will not be amended to the requested +18% premium." RSUF ¶ 27; Appeal File, Exhibit 16.

21. On February 28, the contracting officer unilaterally issued contract modification PA05. The modification stated:

> The purpose of this modification is to add FAR Clause 52.228-13 that was omitted due to administrative oversight:
>
> FAR 52.228-13 Alternative Payment Protections (July 2000)
>
> (a) The Contractor shall submit one of the following payment protections: Payment Bond or Irrevocable Letter of Credit (ILC).
>
> (b) The amount of the payment protection shall be 100 percent of the contract price.

> (c) The submission of the payment protection is required within 15 days of contract award.

RSUF ¶ 26; Appeal File, Exhibit 2 at 8-9 (unnumbered).

22. On March 17, Greenlee wrote to the contracting officer:

> We realize that the GSA can require payment and performance bonds on any job over $25,000.00 but our position is that there is no basis in the FAR for the GSA to require these bonds on jobs under $25,000.00. In effect, you are requiring that Greenlee pay 2.5% that is not required by the FAR and are making our contract on these size jobs a negative 2.5%. If the GSA wants these bonds, then the GSA should pay for them.

RSUF ¶ 28; Appeal File, Exhibit 18.

23. Another letter from Greenlee to the contracting officer, dated March 28, complained that "[t]here is not any profit in our contract as all the prices have been reduced to an unprofitable level." Appeal File, Exhibit 19.

24. On April 4, in response to Greenlee's March 17 letter, the contracting officer wrote:

> GSA has had problems with contractors not paying their subcontractors. Therefore, . . . GSA will not allow you to do any work without any form of payment protection.
>
> . . . .
>
> GSA requests a price proposal for a bond in the amount of $25,000. You have 10 days to provide this proposal to GSA, which is 18 April 2005 by COB [close of business]. Once we receive your proposal and determine that the price is fair and reasonable, GSA will pay for the initial $25,000 bond. Once you exceed the $25,000 amount, you will be responsible for providing additional bonding.

RSUF ¶ 31; Appeal File, Exhibit 22. This letter also states, "[Y]ou were provided an initial $5,000.00 that was obligated for the minimum of your contract." Appeal File, Exhibit 22.

25. With further reference to the first quoted paragraph of the April 4 letter, in responding to a written question posed in discovery as to why she demanded bonds, the contracting officer stated, "To cover the cost of [Greenlee's] jobs and for paying his subcontractors. GSA, Region 4's last 2 partition contractors for Atlanta South, Central and North went under and left subs holding the bag. Some had to seek relief through bankruptcy." Respondent's Answers to Interrogatories for Arnetha Wiggs (Oct. 5, 2006) at 5.

26. Greenlee responded on April 15 to the contracting officer's letter of April 4. The contractor asked that the contract be amended to include a different start date, different line items, an adjustment to the percentage factor to +18%, and an increase in the number of option years from two to four. The contractor also asked that the agency pay it at least $73,400. As to the agency's request for a price proposal for "a bond in the amount of $25,000," Greenlee stated, "We are going to be unable to comply with your deadline of April 18th, 2005 for the price proposal for bonds on under $25,000.00 contracts." RSUF ¶ 32 and appellant's response thereto; Appeal File, Exhibit 23.

27. By letter dated April 27, the contracting officer declined to make any of the contract modifications sought by Greenlee or to make the payment Greenlee requested. She did, however, extend the deadline for Greenlee to provide a price proposal for an initial bond:

> Please provide a price proposal for the $25,000 bond as the Government requested in its letter dated April 4, 2005. From your letter it appears that you misunderstood the Government's position. For clarification purposes, the Government will pay for the initial bond of $25,000 and you will be responsible for any additional amount. However, you may not proceed with any work until a bond is obtained.
>
> . . . .
>
> However, if I have not received this information within the next five (5) business days, I will assume you have no interest in performing work under the current contract and will terminate the contract for the convenience of the Government.

RSUF ¶ 33 and appellant's response thereto; Appeal File, Exhibit 24.

28. On May 3, Greenlee responded to the April 27 letter by filing an appeal with the General Services Board of Contract Appeals (GSBCA), "complaining of unfair contract practices and retaliation and seeking $1,000,000 in damages." After GSA moved to dismiss

the case, on the ground that Greenlee had neither submitted a certified monetary claim to the contracting officer nor received a decision on such a claim, Greenlee withdrew its appeal. The case was dismissed at Greenlee's request. RSUF ¶ 34 and appellant's response thereto; Appeal File, Exhibit 25 at 6-11 (unnumbered); *id.*, Exhibit 27 (*Greenlee Construction, Inc. v. General Services Administration*, GSBCA 16637 (June 15, 2005)).

29. On June 10, 2005, the contracting officer unilaterally issued contract modification PC05. The modification states, "This contract is hereby Terminated for Convenience of the Government effective May 5, 2005 for failure to provide a price proposal for a bond in the amount of $25,000 to be paid for by the Government. This proposal was to be provided within 5 business days from April 27, 2005. The contractor shall be paid the Guaranteed Minimum amount of $5,000." RSUF ¶ 35 and appellant's response thereto.

30. On June 20, 2005, Greenlee submitted to the contracting officer a certified claim in the amount of $2,282,822. The claim consisted of three parts: (a) The contract, Greenlee alleged, was worth $1,000,000 per year for three years. On $3,000,000 in orders, Greenlee said that it would have received $450,000 in profits (15% of $3,000,000) and $510,000 in overhead (17% of $3,000,000). In addition, Greenlee said that its president would have received $405,600 in wages ($65 per hour for 2080 hours per year times three years). (b) "Favored contractors," according to Greenlee, have their partition contracts extended by two years by GSA. Over the additional two years, based on $1,000,000 in orders each year, and applying the same percentage markup and wage figures used in the first part of the claim, Greenlee said that it would have received $300,000 in profits and $340,000 in overhead, and its president would have received $270,400 in wages. (c) Greenlee also claimed reimbursement of attorney fees "related to this contract" in the amount of $6822. In the claim, Greenlee contended that actions by GSA in general and the contracting officer in particular "have demonstrated that at a maximum, the PMC's intent has been to injure Greenlee Construction, Inc. (Greenlee). Likewise, at a maximum, your actions have demonstrated bad faith and arbitrary and capricious behavior. At a minimum, your actions have demonstrated a lack of good faith in the administration of this contract." Greenlee asserted that these actions -- including the termination of the contract for the convenience of the Government -- amounted to a breach of the contract. Appeal File, Exhibit 27.

31. The contracting officer never issued a decision on this claim. On August 24, 2005, Greenlee filed with the GSBCA an appeal from the deemed denial of the claim. That board docketed the case as GSBCA 16722.

32. On January 18, 2006, Greenlee submitted to the contracting officer a certified claim in the amount of $165,000. This claim is for termination for convenience settlement charges. According to the claim, the contract "is clear that the contract minimum is $50,000"

per year, and in modification PC03 (*see* Background ¶ 16), the contracting officer increased that amount by $5000, making the "contract minimum" $55,000 per year. Greenlee asserted that GSA owed it $55,000 for each of the contract's three years -- the base year and two option years. In the claim, the contractor alleged that the contracting officer terminated the contract "for no just reason." Greenlee maintained that because the given reason for the termination was that the contractor "refused to get bonding for jobs under $25,000" and the contract did not obligate the contractor to obtain such bonds, the termination constituted a breach of contract. Notice of Appeal (CBCA 448), Attachment 1.

33. On March 10, 2006, the contracting officer issued a decision denying this claim. She explained:

> Greenlee Construction, Inc. never officially started any work on this contract. GSA held a Pre-Start conference on February 16, 2005, and on February 18, 2005, Mr. Greenlee [Greenlee's president] agreed to provide GSA with Tripartite payment protection as a valid means of payment protection and referenced FAR clause 28.102. Once we received the agreement, a Notice to Proceed would have been issued.
>
> Greenlee refused to perform under the terms of the bid that he submitted once he discovered the terms of Gem Technologies' bid and stated such in his letter dated February 25, 2005. . . .
>
> . . . .
>
> Greenlee is not entitled to any minimum guarantee based on his refusal to perform under the terms of his contract.

Notice of Appeal (CBCA 448), Attachment 2. The parties agree that notwithstanding the statement in contract modification PC05 that "[t]he contractor shall be paid the Guaranteed Minimum amount of $5,000," *see* Background ¶ 29, GSA has not paid Greenlee that $5000. RSUF ¶ 35 and appellant's response thereto.

34. On April 10, 2006, Greenlee filed with the GSBCA an appeal of the contracting officer's decision of March 6, 2006. That board docketed the case as GSBCA 16864.

35. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, the GSBCA was terminated and its cases, personnel, and other resources were transferred to the newly-established

Civilian Board of Contract Appeals (CBCA). The CBCA redesignated GSBCA 16722 as CBCA 415 and GSBCA 16864 as CBCA 448.

## Discussion

GSA has asked the Board to deny these appeals by granting the agency's motion for summary relief. Resolving a dispute on such a motion is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

### CBCA 415

In CBCA 415, Greenlee claims that it is entitled to be paid $2,282,822 because GSA's actions -- and in particular, the contracting officer's determination to terminate the contract for the convenience of the Government -- were at best taken without good faith and constituted a breach of the contract. Background ¶ 30.

The termination for convenience clause incorporated by reference in this contract provides, "The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." 48 CFR 52.249-2 (2003) (*see* Background ¶ 10). This clause grants the contracting officer exceptional authority. "In no other area of contract law has one party been given such complete authority to escape from contractual obligations. This clause gives the Government the broad right to terminate without cause." *IMS Engineers - Architects, P.C.*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,672 (quoting John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 1073 (3d ed. 1995)).

"It is not the province of the courts to decide *de novo* whether termination was the best course." *Salsbury Industries v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990). Instead, a tribunal may find that a convenience termination constituted a breach of contract only if the tribunal finds that the termination was motivated by bad faith or constituted an abuse of discretion, or that the Government entered into the contract with no intention of fulfilling its promises. Because government officials are presumed to act in good faith, the contractor's burden of proving that actions were taken in bad faith is heavy. *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999); *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541, 1543-44 (Fed. Cir. 1996); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995); *Robert P. Neathery*, DOT BCA 4177, 04-2

BCA ¶ 32,649, at 161,585; *Max S. Castle*, AGBCA 97-137-1, 00-1 BCA ¶ 30,871, at 152,426.

The contracting officer said that she terminated Greenlee's contract "for failure to provide a price proposal for a bond in the amount of $25,000 to be paid for by the Government." Background ¶ 29. Greenlee maintains that "[t]his bonding issue was only a ruse to get rid of Greenlee." ASUF ¶ 3. Further, the contractor argues, "In the history of contracting, has there ever been a more grossly erroneous reason for terminating a $5,000,000 contract than *failure to provide a price proposal*? There is absolutely no way that the government can show that there is anything reasonable about this decision." Appellant's Opposition at 24.

It is conceivable, making inferences in favor of the contractor as non-movant, that the contracting officer's stated reason for termination was not the sole reason for acting as she did, or even the principal reason for her action. It is also conceivable, making such inferences, that the contracting officer did not treat Greenlee as well as she treated other contractors who had similar, indefinite quantity contracts for partitioning in the Atlanta area. Some of the contracting officer's actions appear to have been irregular -- for example, her repeated use of unilateral modifications to the contract to adjust important rights and responsibilities of the parties. *See* Background ¶¶ 16 (apparently intending to reduce the guaranteed minimum from $25,000 to $5000), 21 (requiring provision of bonds in the amount of $25,000 prior to agreeing to pay for same). Even if Greenlee were able to prove these things, however, it would not prevail in its challenge to the termination of its contract.

The provision of performance and payment bonds is an important aspect of government construction contracts. Contracting officers are authorized by law to require contractors to provide the Government with any of various forms of payment protection, including performance and payment bonds. While holders of construction contracts in amounts greater than $25,000 must provide such protection, a contracting officer has the authority to require a form of security for construction contracts in smaller amounts. 40 U.S.C. § 270a & note thereto (2000); 48 CFR 28.102-1(b)(1); *Quick-Deck, Inc.*, PSBCA 1451, 86-2 BCA ¶ 18,986, at 95,876.

This contract as awarded did not appear to require Greenlee to provide performance and payment bonds if the value of the work it performed was $25,000 or less. This is so because the contract said that bonds were required only if the contract price was "more than $25,000," and the guaranteed minimum amount of this indefinite quantity contract was exactly $25,000. *See* Background ¶¶ 2, 3, 7. Under the contract's Changes clause, however, the contracting officer could issue an order changing the contract and make an equitable adjustment to the contract price to cover the cost of the change. 48 CFR 52.243-4 (*see*

Background ¶ 10). Even if the contract as awarded did not require that Greenlee provide performance and payments bonds for work valued at $25,000 or less, the contracting officer effectively employed the Changes clause in requiring the provision of these bonds and agreeing to pay for the contractor's compliance with her direction. *See* Background ¶¶ 21, 24, 27.

A contractor's failure to furnish required bonds has been found to be good cause for a contracting officer's terminating a contract for default. *Airport Industrial Park, Inc. v. United States*, 59 Fed. Cl. 332, 334-35 (2004) (collecting cases); *AJN Reporters*, GSBCA 5022, 78-2 BCA ¶ 13,298; *Quick-Deck*. The contracting officer was clear in explaining to Greenlee that GSA wanted the contractor to provide bonds so that it would not repeat the unhappy experience of having subcontractors to holders of similar contracts go without payment for their services. Background ¶ 24; *see also id.* ¶ 25 (further explanation given after filing of appeal). Greenlee was also clear in its response: it first said that is was "unable to comply with your deadline . . . for the price proposal for bonds on under $25,000.00 contracts," and later, in response to the contracting officer's extension of the deadline, persisted in refusing to provide a proposal. *Id.* ¶¶ 26-28. If this sort of action by a contractor can serve as justification for a termination for default, it can surely serve as justification for a termination for which a contracting officer has far more leeway, a termination for the convenience of the Government.

Even if the failure to provide a price proposal for the bonds might be deemed to be insufficient justification for a termination for convenience, the uncontested record shows that the contracting officer had another, ample reason for issuing the termination: Greenlee was a consistently uncooperative contractor, and it is unquestionably in the Government's interest to be free from such a party.

-- In December 2004, just after receiving the award of the contract, Greenlee demanded that GSA issue it no orders for carpeting or painting line item work, complaining that these items "have historically been the lowest or no profit jobs on the partition list." Background ¶ 12. Greenlee also warned that "more problems" would occur if GSA decided to give the contractor as little as $50,000 worth of work. *Id.*

-- Later that month, in response to a request for a proposal for a percentage adjustment on a revised list of line items, Greenlee proposed a figure, +85%, which an agency cost estimator considered "very extreme" and the contracting officer thought did not warrant negotiation. Background ¶ 15.

-- In February 2005, Greenlee demanded that GSA place no orders against the contract until the contract was amended to increase the percentage adjustment from "net" to +18%. Background ¶ 19. (Greenlee apparently did not realize that the percentage adjustment on the Gem contract, to which it compared its own contract, applied to line items for which some of the base prices were considerably lower than those on the Greenlee contract. Nor did Greenlee seem to realize that 18% was the percentage factor under the Gem contract only for work performed outside regular working hours; the factor was only +13% for work performed within such hours. *See id.* ¶¶ 13, 14.)

-- In March 2005, Greenlee complained that "[t]here is not any profit in our contract," even though the prices in that contract were the exact same ones that Greenlee had bid. Background ¶ 23; *see also id.* ¶ 15 (agency determination not to modify contract).

-- Then in April 2005, in addition to failing to provide a price proposal for bonds, Greenlee asked that the contract be amended to include a different start date, different line items, an adjustment of the percentage factor to +18%, and an increase in the number of option years from two to four -- and also asked that the agency pay it at least $73,400. Background ¶ 26. And when the contracting officer declined to do any of these things, Greenlee asked the GSBCA to award it $1,000,000 in damages. *Id.* ¶ 28. (The appeal was withdrawn within two months, perhaps after Greenlee realized that the board had no jurisdiction to hear it. *See id.*)

It does not take much imagination to see how a contracting officer would find it advantageous to end legal entanglements with a contractor who behaved in this fashion.

Given the ample justification GSA had for terminating the contract for the convenience of the Government, we cannot find that the termination was motivated by bad faith or constituted an abuse of discretion, or that the Government entered into the contract with no intention of fulfilling its promises. We consequently find that the termination was not a breach of the contract and deny CBCA 415.

CBCA 448

In CBCA 448, Greenlee claims that it is entitled to be paid $165,000 in termination settlement charges. The claim is premised on the theory that because GSA terminated the contract for the convenience of the Government, it must pay Greenlee the guaranteed minimum amount of the contract for each of three contract years. The guaranteed minimum,

according to Greenlee, is $55,000 -- $50,000 as specified in the contract as awarded, plus $5000 which the contracting officer added to that amount. Background ¶ 32.

This claim is misguided in several ways.

First, the guaranteed minimum amount of the contract as awarded was clearly stated to be $25,000, not $50,000. Background ¶ 3. The latter figure was the low end of the Government's estimate of the value of orders which would be placed under the contract, not the guaranteed minimum. *Id.*; *see International Data Products Corp. v. United States*, Nos. 2006-5083, -5094 (Fed. Cir. June 27, 2007), slip op. at 9 (contractor cannot reasonably expect to receive government estimate of orders under indefinite quantity contract).

Second, whether the contracting officer added $5000 to the guaranteed minimum is uncertain. In a unilateral contract modification dated January 19, 2005, the contracting officer said that she was "add[ing] $5000.00 to base year contract," not that she was adding $5000 to the guaranteed minimum. Background ¶ 16. She also said that the "purchase request [was] to cover the minimum guarantee of $5,000," which might mean that she was decreasing the guaranteed minimum to $5000, not that she was adding $5000 to the guaranteed minimum. *Id.* Other documentation suggests that the latter alternative was more likely her intention. *See id.* ¶¶ 17 (referring to "the guaranteed minimum of $5,000"), 24 (calling $5000 a sum "that was obligated for the minimum of your contract"), 29 (referring to "the Guaranteed Minimum amount of $5,000"). (Whether the contracting officer had the authority to change the guaranteed minimum of the contract unilaterally is irrelevant to the resolution of this case.)

Third, the guaranteed minimum was for "this contract" and "this award," not for each year of the contract. Background ¶ 3. GSA never exercised its option to extend the contract beyond the base year, so any compensation for any option year would not be justified.

Fourth, even for the base year, if Greenlee were to receive any termination settlement amount, that amount would be far less than the guaranteed minimum. The proper remedy for a breach of contract is to place the non-breaching party "in as good a position pecuniarily as he would have been by performance of the contract," "not . . . to be put in a better position by the recovery than if the [other party] had fully performed the contract." *White v. Delta Construction International, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002) (quoting *Miller v. Robertson*, 266 U.S. 243, 257, 260 (1924)). Consequently, the proper basis for damages is the loss the contractor suffered as a result of the breach, not the full amount it would have received if the breach had not occurred. Any costs the contractor might have incurred from performing work valued at the guaranteed minimum amount must be subtracted from that amount to reach the correct figure for damages. *Id.* at 1041, 1045; *Marut Testing &*

*Inspection Services, Inc. v. General Services Administration*, GSBCA 15412, 02-2 BCA ¶ 31,945, at 157,823. Whether a contractor like Greenlee who complained that "[t]here is not any profit in our contract" could prove any amount of damages is questionable. *See* Background ¶ 23. And of overriding importance here, as we have already concluded with regard to CBCA 415, GSA acted permissibly under the contract and was not in breach when it terminated the contract for the convenience of the Government.

Fifth, and finally, under the Termination for Convenience clause, the contractor was entitled to a termination settlement amount consisting of (a) the cost of work performed before the effective date of the termination, (b) a fair and reasonable profit on that cost (unless the contractor would have sustained a loss on the entire contract had it been completed), (c) the cost of settling and paying termination settlement proposals under terminated subcontracts, and (d) reasonable administrative and other costs of settlement of the work terminated. 48 CFR 52.249-2, Alternate I, ¶ (g). Greenlee has not shown or even suggested that it incurred any of the costs described in (a), (c), and (d) above. (The contractor has shown us that one task order was issued to it under the contract and has asserted that three or four other task orders were issued. ASUF ¶ 8 and respondent's response thereto; Appeal File, Exhibit 60. The contractor has not shown us that it performed any work under any task order, however, or that it incurred any costs in performing.) Because Greenlee has not shown that it incurred any costs of work performed before the effective date of the termination (a), it cannot receive any profit on those costs (b).

In light of these infirmities, CBCA 448 is denied.

## Decision

GSA's motion for summary relief is granted. Each of the two appeals addressed in this decision, CBCA 415 and CBCA 448, is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ROBERT W. PARKER
Board Judge

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ALLAN H. GOODMAN
Board Judge